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# Decision

**Matter of:** Noble Supply and Logistics, Inc.--Costs

**File:** B-417571.4

**Date:** November 27, 2019

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## DIGEST

Request for a recommendation for reimbursement of protest costs is denied where the initial protest grounds were not clearly meritorious and where the agency did not unduly delay taking corrective action in response to a supplemental protest ground.

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## DECISION

Noble Supply and Logistics, Inc. (Noble) of Rockland, Massachusetts, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest challenging the award of a contract to Mancon, LLC, under request for proposals (RFP) No. N0018918R0007, issued by the Department of the Navy for materials and logistical services in support of the Naval Facilities Mid-Atlantic Public Works Department in Crane, Indiana. Noble argues that its protest was clearly meritorious and that the agency unduly delayed taking corrective action.

We deny the request.

## BACKGROUND

The RFP, issued on February 8, 2019, contemplated award of a single indefinite-delivery, indefinite-quantity fixed-price contract, with economic price adjustment provisions, on a best-value tradeoff basis. Agency Report (AR), exh. 1, RFP at 67, 113. The solicitation advised that in evaluating proposals, non-price factors--technical, past performance, and small business participation plan--were to be significantly more important than price. *Id.* at 113. The technical factor was significantly more important

than past performance, and past performance was more important than the small business participation plan. Id. The technical factor was evaluated using three subfactors: the performance approach, the management approach, and the transition/phase-in plan; among those three, the performance approach subfactor was significantly more important than the management approach and transition/phase-in plan subfactors, which were both of equal importance. Id.

The agency received proposals from five offerors, including Noble and Mancon. AR, exh. 6, Technical Evaluation Board (TEB) Report, at 1. After evaluating proposals, the agency concluded that Mancon's proposal represented the best value to the government, and awarded the contract to Mancon on April 30. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 18-20.

On May 13, 2019, Noble filed its initial protest with our Office (B-417571.1), in which it raised the following allegations: (1) Noble's proposal was evaluated unreasonably under the technical factor and not in accordance with the solicitation; (2) the offerors' proposals were not treated equally under the technical factors; (3) Noble's past performance factor was evaluated unreasonably and not in accordance with the solicitation; (4) the offerors' past performance factors were not treated equally; and (5) the agency's best-value determination was not in accordance with the solicitation. Protest at 2, 15-27.

On May 23, the agency filed a request for partial dismissal, arguing that two of Noble's protest arguments lacked adequate support, which our Office denied. On June 12, the agency filed its agency report, in which it defended its evaluation and award decision. Thereafter, on June 24, Noble filed its comments on the agency's report, maintaining its initial protest grounds regarding the agency's unreasonable and unequal evaluation of technical and past performance proposals and unreasonable best-value tradeoff determination. Protester's Comments & Supp. Protest at 2-35. In its filing, the protester also raised, as a supplemental protest ground (B-417571.2), a challenge to the agency's evaluation of the awardee's past performance, claiming that Mancon's past performance evaluation was flawed because it was based entirely on the contract performance of a legally distinct, affiliated entity and not on any performance by Mancon. Id. at 36.

On June 28, four days after Noble filed its supplemental protest and well before the due date for the supplemental agency report, the Navy notified our Office that it would take corrective action by conducting discussions, reevaluating proposals, and making a new source selection decision. Agency Notice of Corrective Action at 1. On July 1, our Office dismissed Noble's protest as academic. Noble Supply & Logistics, Inc., B-417571, B-417571.2, July 1, 2019 (unpublished decision). On July 3, Noble filed a request for reconsideration of our decision to dismiss its protest as academic. On July 26, our Office dismissed the request for reconsideration, finding that Noble failed to demonstrate that our decision dismissing the protest as academic was legally or factually erroneous. Noble Supply & Logistics, Inc.--Recon., B-417571.3, July 26, 2019 (unpublished decision). Subsequently, Noble timely filed this request, pursuant to 4

C.F.R. § 21.8(e), that we recommend that the Navy reimburse Noble its reasonable costs of filing and pursuing the protest.

## DISCUSSION

Noble contends that reimbursement is warranted because its initial protest included clearly meritorious protest grounds,<sup>1</sup> and the agency's corrective action, taken after it filed its initial report, was unduly delayed. Req. for Costs at 1. Noble maintains it should be reimbursed protest costs because a reasonable agency inquiry into the initial protest allegations would have revealed the merit of the alleged evaluation errors and obviated the need for Noble to prepare and file its comments and supplemental protest. Id. at 3-4, 7. In particular, Noble contends that its supplemental protest ground regarding the evaluation of Mancon's past performance was so intertwined with its initial protest allegations regarding the unreasonable and unequal evaluation of the offerors' proposals--including their past performance proposals--that a reasonable investigation by the agency of Noble's initial protest grounds would have revealed the flaws alleged later in the supplemental protest. Id. at 6-7; Protester's Reply to the Agency at 3. Noble argues that the agency unduly delayed taking corrective action with regard to Noble's protest grounds when it failed to act until after the agency report was due. Id.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. See 4 C.F.R. § 21.8(e); see also AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5-6. Thus, as a prerequisite to our recommending

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<sup>1</sup> Noble states that the agency failed to specify in its corrective action notice the reasons it was proposing to take corrective action and asserts on this basis that the Navy was proposing to fix all of the alleged procurement errors described in Noble's initial and supplemental protests. Req. for Costs at 6. We note, however, that the memorandum prepared by the contracting officer (CO) contemporaneously with the corrective action notice sufficiently articulated the rationale for the agency's decision. Specifically, the CO stated that, upon review of the supplemental protest ground, the agency determined that:

The past performance evaluation of MANCON, in which the Agency evaluated the past performance of Management Consulting, Inc. (doing business as MANCON) . . . (the incumbent contractor) as if it were MANCON, LLC (the awardee) may have been unreasonable under the circumstances.

Agency's Response to Request for Costs, exh. 1, Memorandum for the File, at 1-2. In this context, we view the agency's corrective action as tailored to address only the issue raised in the supplemental protest.

that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, i.e., not a close question. InfraMap Corp.--Costs, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3; see also Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious so as to warrant reimbursement of protest costs. See Triple Canopy, Inc.--Costs, supra.

With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Request for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we usually consider corrective action to be prompt if taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. The imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in a competitive procurement. See Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3. Here, we find that reimbursement is not appropriate because Noble's initial protest grounds were not clearly meritorious and the Navy took prompt corrective action in response to Noble's supplemental protest.

#### Clearly Meritorious

With regard to Noble's initial protest grounds, we find that none was clearly meritorious. We considered all of the parties' assertions and address Noble's more salient arguments below.

Noble's initial protest raised numerous challenges to the agency's evaluation of Noble's technical proposal; the protester alleged, for example, that the technical evaluation ratings were based on adjectival ratings rather than a qualitative assessment of the protester's proposal, and also that the subfactor ratings were not assigned in accordance with the solicitation. Protest at 15-19. Specifically, Noble asserted that since its technical proposal was assigned two strengths, no weaknesses, significant weaknesses, or deficiencies, and its performance risk was evaluated as "low," it necessarily followed that the agency should have rated the protester's technical proposal "outstanding," instead of "good."<sup>2</sup> Protest at 15. Noble also alleged that the

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<sup>2</sup> The RFP advised offerors that in order to receive an outstanding rating, a proposal would have to "indicate[] an exceptional approach and understanding of the

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Navy failed to explain or document why Mancon's technical proposal was rated "outstanding." Id. at 20.

The agency responded that its evaluation of Noble's proposal was consistent with the terms of the RFP because Noble demonstrated a "thorough approach and understanding of the requirements" that was only adequate and thus merited a "good" rating. COS/MOL at 21-23; AR, exh. 6, TEB Report, at 8. Similarly, the agency explains that the evaluation of Mancon's technical proposal was reasonable, as is evidenced "by the Navy's robust evaluation and source selection record." Agency's Response to Request for Costs at 8; COS/MOL at 27-28.

We have reviewed the record, and agree with the agency. We have consistently stated that evaluation ratings and the number of strengths and weaknesses assessed are merely a guide to, and not a substitute for, intelligent decision making in the procurement process. Affolter Contracting Co., Inc., B-410878, B-410878.2, Mar. 4, 2015, 2015 CPD ¶ 101 at 11 n.10. There is no legal requirement that an agency award the highest possible rating under an evaluation factor simply because the proposal contains strengths or is not evaluated as having any weaknesses. See Applied Tech. Sys., Inc., B-404267, B-404267.2, Jan. 25, 2011, 2011 CPD ¶ 36 at 9. Accordingly, where the evaluation and source selection decision reasonably consider the underlying basis for the ratings, including the advantages and disadvantages associated with the specific content of competing proposals, in a manner that is fair and equitable, and consistent with the terms of the solicitation, the protester's disagreement over the actual numerical, adjectival, or color ratings is essentially inconsequential in that it does not affect the reasonableness of the judgments made in the source selection decision. General Dynamics, Am. Overseas Marine, B-401874.14, B-401874.15, Nov. 1, 2011, 2012 CPD ¶ 85 at 10. Given that the protester's allegations consist of no more than disagreement with agency's ratings, we decline to view this protest ground as clearly meritorious.

Next, Noble also objected to the agency's past performance evaluation of its own and Mancon's proposals as unreasonable and unequal. Protest at 21-24. With respect to the evaluation of its own past performance, Noble alleged that the agency "unduly relied upon a single marginal rating out of 22 total ratings" to the exclusion of other, more representative ratings in assigning a confidence assessment rating; according to Noble, the agency also unreasonably relied on Contractor Performance Assessment Reporting System adjectival ratings without considering the underlying narrative for these ratings. Protest at 21.

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requirements and contain[] multiple strengths, and risk of unsuccessful performance [would have to be] low." RFP at 114. A "good" proposal, on the other hand, would have to demonstrate only "a thorough approach and understanding of the requirements and contain[] at least one strength, and risk of unsuccessful performance [would have to be] low to moderate." Id.

In response, the agency argued that the evaluation was reasonable and supported by the evaluation record. COS/MOL at 28. The Navy claimed that the confidence ratings were based on “an integrated assessment of all relevant past performance information” at the CO’s disposal, including supportive narrative information available on past contracts. Id.

In our view, Noble’s protest challenging the past performance evaluation of its own proposal was likewise not clearly meritorious. An agency’s evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror’s performance history, is a matter of discretion which we will not disturb unless the agency’s assessments are unreasonable or inconsistent with the solicitation criteria. Affolter Contracting Co., Inc., supra, at 12; National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 4. Here, Noble has not shown that the Navy lacked a defensible legal position to support its past performance evaluation of the protester, which was based on the reasonably assessed past performance information available to the agency. As a result, Noble’s protest was not clearly meritorious on this issue.

Finally, with respect to the evaluation of Mancon’s past performance proposal and allegations of disparate treatment of offerors’ past performance, the protester contends that its supplemental protest allegation was so intertwined with its initial protest challenges that a reasonable investigation by the Navy of Noble’s initial protest grounds would have revealed the flaws identified later in the supplemental protest.

We disagree. Noble’s initial protest alleged, generally, that the agency treated the offerors’ past performance disparately because it applied “an unequal standard to the proposals”; and claimed that the Navy used a single outlier rating of “marginal” out of 22 total ratings to conclude that Noble’s past performance was “inconsistent.” Beyond these general allegations, however, the protest included only a single sentence regarding Mancon’s past performance, as follows:

To the extent that Mancon’s past performance ratings were split between two or more categories, it too should have been considered “inconsistent” and if it was not, then the Agency treated the offerors disparately.

Protest at 24. This assertion appears to relate to the quality of the past performance evaluation; the supplemental protest, on the other hand, challenging the evaluation of Mancon’s past performance as unreasonable because it was based on the contract performance of an entity other than Mancon, raised the issue of the corporate identity of the entity receiving credit for past performance. We view those issues as involving different sets of core facts. Accordingly, we do not consider the unequal past performance challenge in Noble’s initial protest as having sufficient nexus to the supplemental protest ground regarding Mancon’s past performance, so that a reasonable agency investigation of initial protest grounds would have necessarily “led the agency directly to the conclusion to which it eventually arrived,” prompting its corrective action, as the protester alleges. Protester’s Reply to the Agency at 4.

Contrary to the protester's assertions, the initial and supplemental protest grounds did not involve the "the same underlying issue" that later led to the agency's corrective action.

While we recognize that Noble could not have raised the supplemental protest ground set forth in its comments on the agency's report with any degree of specificity prior to gaining access to the procurement record, the protester has failed to demonstrate that its initial challenges to the agency's evaluation of Mancon's past performance provided a clearly meritorious basis to sustain the protest.

#### Undue Delay

As discussed above, four days after Noble filed its comments on the agency report and a supplemental protest, the agency notified our Office that it intended to take corrective action to, among other things, "re-evaluate the proposals." Agency Notice of Corrective Action at 1. The contemporaneous record indicates that the agency's determination was based on its conclusion that the past performance evaluation of Mancon "may have been unreasonable under the circumstances." Agency's Response to Request for Costs, exh. 1, Memorandum for the File, at 1-2. This action by the agency, rather than filing a supplemental agency report responding to the new allegation, constitutes the prompt action that our protest procedures contemplate.

Specifically, as noted earlier, there is no basis in the record here to conclude that the initial protest identified the issue on which the corrective action was based such that it would be appropriate to measure the promptness of the agency's corrective action from the filing date of the initial protest. See Diligent Consulting, Inc.--Costs, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5-6. In this regard, notwithstanding Noble's challenge to the unreasonable and unequal evaluation of past performance raised in its initial protest, Noble did not raise a specific allegation concerning Mancon's past performance evaluation until its supplemental protest. Further, the record is clear that the agency took prompt corrective action prior to filing its supplemental agency report. Because the agency did not unduly delay taking corrective action, we do not recommend reimbursement of these protest costs.

The request for costs is denied.

Thomas H. Armstrong  
General Counsel